# DOCKET

No. 08-10914

| | |
|---|---|
| Title: | Jamey L. Wilkins, Petitioner |
| | v. |
| | Officer Gaddy |
| Docketed: | June 16, 2009 |
| Lower Ct: | United States Court of Appeals for the Fourth Circuit |
| Case Nos.: | (08-7881) |
| Decision Date: | January 23, 2009 |
| Rehearing Denied: | May 8, 2009 |

| Date | Proceedings and Orders |
|---|---|
| Jun 9 2009 | Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 16, 2009) |
| Jul 30 2009 | DISTRIBUTED for Conference of September 29, 2009. |
| Sep 23 2009 | Response Requested . (Due October 23, 2009) |
| Oct 16 2009 | Brief of respondent Officer Gaddy in opposition filed. |
| Oct 29 2009 | DISTRIBUTED for Conference of November 13, 2009. |
| Nov 19 2009 | DISTRIBUTED for Conference of November 24, 2009. |
| Nov 23 2009 | Record Requested . |
| Dec 2 2009 | Record received from U.S. District Court Western District of North Carolina (electronic file). |
| Dec 3 2009 | Record received from U.S Court of Appeals for the Fourth Circuit (one envelope). |
| Jan 4 2010 | DISTRIBUTED for Conference of January 8, 2010. |
| Jan 11 2010 | DISTRIBUTED for Conference of January 15, 2010. |
| Jan 19 2010 | DISTRIBUTED for Conference of January 22, 2010. |
| Feb 16 2010 | DISTRIBUTED for Conference of February 19, 2010. |
| Feb 22 2010 | The petition for certiorari and the motion for leave to proceed in forma pauperis are GRANTED. The judgment of the Court of Appeals is REVERSED, and the case is REMANDED for further proceedings consistent with this opinion. Justice Thomas filed an opinion concurring in the judgment in which Justice Scalia joins. Opinion per curiam. (Detached Opinion) |

# PETITION FOR WRIT OF CERTIORARI

No. 08-10914

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Jamey Lamont Wilkins — PETITIONER
(Your Name)

VS.

Officer Gaddy — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

[ ✓ ] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

U.S. District Court for Western District of N.C.

U.S. Court of appeals for the 4th Circuit

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Jamey Wilkins
(Signature)

## AFFIDAVIT OR DECLARATION
## IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Jonesy Wilkins, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

| **Income source** | **Average monthly amount during the past 12 months** | | **Amount expected next month** | |
|---|---|---|---|---|
| | You | Spouse | You | Spouse |
| Employment | $ 0 | $ N/A | $ 0 | $ N/A |
| Self-employment | $ 0 | $ N/A | $ 0 | $ N/A |
| Income from real property (such as rental income) | $ 0 | $ N/A | $ 0 | $ N/A |
| Interest and dividends | $ 0 | $ N/A | $ 0 | $ N/A |
| Gifts | $ 0 | $ N/A | $ 0 | $ N/A |
| Alimony | $ 0 | $ N/A | $ 0 | $ N/A |
| Child Support | $ 0 | $ N/A | $ 0 | $ N/A |
| Retirement (such as social security, pensions, annuities, insurance) | $ 0 | $ N/A | $ 0 | $ N/A |
| Disability (such as social security, insurance payments) | $ 0 | $ N/A | $ 0 | $ N/A |
| Unemployment payments | $ 0 | $ N/A | $ 0 | $ N/A |
| Public-assistance (such as welfare) | $ 0 | $ N/A | $ 0 | $ N/A |
| Other (specify): _____ | $ 0 | $ N/A | $ 0 | $ N/A |
| **Total monthly income:** | $ 0 | $ N/A | $ 0 | $ N/A |

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

| Employer | Address | Dates of Employment | Gross monthly pay |
|---|---|---|---|
| NONE | N/A | N/A | $ 0 |
| NONE | N/A | N/A | $ 0 |
| NONE | N/A | N/A | $ 0 |

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

| Employer | Address | Dates of Employment | Gross monthly pay |
|---|---|---|---|
| N/A | N/A | N/A | $ N/A |
| | | | $ |
| | | | $ |

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

| Financial institution | Type of account | Amount you have | Amount your spouse has |
|---|---|---|---|
| NONE | NONE | $ 0 | $ 0 |
| NONE | | $ | $ |
| NONE | | $ | $ |

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

| Person owing you or your spouse money | Amount owed to you | Amount owed to your spouse |
|---|---|---|
| NONE | $ 0 | $ N/A |
| | $ | $ |
| | $ | $ |

7. State the persons who rely on you or your spouse for support.

| Name | Relationship | Age |
|---|---|---|
| NONE | N/A | N/A |

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

| | You | Your spouse |
|---|---|---|
| Rent or home-mortgage payment (include lot rented for mobile home) | $ 0 | $ N/A |
| Are real estate taxes included? ☐ Yes ☐ No<br>Is property insurance included? ☐ Yes ☐ No | | |
| Utilities (electricity, heating fuel, water, sewer, and telephone) | $ 0 | $ N/A |
| Home maintenance (repairs and upkeep) | $ 0 | $ N/A |
| Food | $ 0 | $ N/A |
| Clothing | $ 0 | $ N/A |
| Laundry and dry-cleaning | $ 0 | $ N/A |
| Medical and dental expenses | $ 0 | $ N/A |

| | You | Your spouse |
|---|---|---|
| Transportation (not including motor vehicle payments) | $ 0 | $ N/A |
| Recreation, entertainment, newspapers, magazines, etc. | $ 0 | $ N/A |
| **Insurance** (not deducted from wages or included in mortgage payments) | | |
| Homeowner's or renter's | $ 0 | $ N/A |
| Life | $ 0 | $ N/A |
| Health | $ 0 | $ N/A |
| Motor Vehicle | $ 0 | $ N/A |
| Other: _____ | $ 0 | $ N/A |
| **Taxes** (not deducted from wages or included in mortgage payments) | | |
| (specify): _____ | $ 0 | $ N/A |
| **Installment payments** | | |
| Motor Vehicle | $ 0 | $ N/A |
| Credit card(s) | $ 0 | $ N/A |
| Department store(s) | $ 0 | $ N/A |
| Other: _____ | $ 0 | $ N/A |
| Alimony, maintenance, and support paid to others | $ 0 | $ N/A |
| Regular expenses for operation of business, profession, or farm (attach detailed statement) | $ 0 | $ N/A |
| Other (specify): _____ | $ 0 | $ N/A |
| **Total monthly expenses**: | $ 0 | $ N/A |

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☑ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☑ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I am a broke prisoner

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: January 6-1-09, 2009

_____
(Signature)

No. _____

08-9014 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Supreme Court, U.S.
FILED
JUN - 9 2009
OFFICE OF THE CLERK

Jarrey Lamont Wilkins — PETITIONER
(Your Name)

vs.

Officer Gaddy — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals for the 4th circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jarrey Wilkins
(Your Name)

1300 Western Blvd
(Address)

Raleigh, N.C. 27606
(City, State, Zip Code)

N/A
(Phone Number)

## QUESTION(S) PRESENTED

1. Should plaintiff be expected to prove his claims before discovery?

2. ARE NON visible wounds (exacerbated blood pressure, migraines over back pains plus psychological trauma) considered de minimis since the only visible wound is a bruise?

3. Should case be dismissed "sua sponte" if the possibility of proving your claims exist?

## LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## TABLE OF CONTENTS

OPINIONS BELOW ..... 1

JURISDICTION .....

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....

STATEMENT OF THE CASE .....

REASONS FOR GRANTING THE WRIT .....

CONCLUSION .....

## INDEX TO APPENDICES

APPENDIX A

APPENDIX B

APPENDIX C Original Claim

APPENDIX D All ORDERS

APPENDIX E

APPENDIX F

## TABLE OF AUTHORITIES CITED

**CASES** **PAGE NUMBER**


Hudson v. McMillian 0, 5

Davidson v. Flynn 0,

Haines v Kerner 3, 5

~~Whitley v Albers~~ 5

Siglar V. Highhouse 5

Boddie v Schneider 5

Griffen v Crippen 5

Burgess v. MOORE 5

Anderson v Liberty Lobby Inc 5


**STATUTES AND RULES**

**OTHER**

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

[✓] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

## JURISDICTION

[✓] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 1-23-09.

[ ] No petition for rehearing was timely filed in my case.

[✓] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: May 8, 2009, and a copy of the order denying rehearing appears at Appendix A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## STATEMENT OF THE CASE

On March 27, 2008, Plaintiff filed claim pro se

Claim was dismissed because I did not allege that my injuries required medical attention. I simply did not know I had to at that juncture, I only listed them all.

Upon ~~reconsideration~~ filing "motion for Reconsideration" plaintiff stated he was seen and diagnosed for all injuries, but it was denied saying this was not new evidence! When the reason it was dismissed sua sponte was for absence of this.

All other appeals were denied. The court responded without proof I have no basis for claim but I was never allowed to obtain the proof that is in my medical jacket thru Discovery.

The objective component of an excessive force claim is satisfied if the injury suffered results from something more than de minimis use of force. See Hudson v. McMillian 503 US 1, 9-10 (1992). Davidson v. Flynn 32 F3d 27, 29 (2d Cir 1994) significant injury, that is injury that requires medical attention or leaves permanent marks is not required. Hudson at 7-8, 13 (The absence of serious injury is relevant to the inquiry but does not end it.)

Video tape exist of the assault and the strongest 8th Amendment claim is one where no force was needed at all. And in my claim none was. It clearly will show the malicious and sadistic intent and be repugnant to the conscience of mankind when one sees it. But it never got the chance

BEST AVAILABLE COPY

Supreme Court of the United States

Jamey Lamont Wilkins
plaintiff - appellant

v

Case 3:08-cv-00138-GCM

officer Gaddy
defendant

RECEIVED
MAY 27 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Petition for Writ of Certiorari

To the Honorable Judges of the Supreme Court of the U.S.

Now comes Jamey Wilkins, petitioner, pro se, respectfully petitioning this court to grant it's writ of certiorari pursuant to G.S. 7A-32(c), 15A-1442 et seq and rule 21 of the N.C. rules of appellate procedure to review the orders of the Honorable District Court Judge Graham Mullen and the orders of the Honorable U.S. Court of appeals for the 4th Circuit Judges Motz and Shedd and senior circuit Judge Hamilton. (orders are attached)

The issue of whether my constitutional rights were violated or not rarely never even came into question since my case was dismissed sua sponte upon initial review because "nowhere does plaintiff allege that his alleged medical injuries required medical attention - he does not allege that he has been treated by a doctor or diagnosed

with any of these alleged ailments. Consequently, plaintiff's claim fails as a matter of law," so I did not meet the de minimus requirement

As a pro se inmate I simply did not know I had to disclose that in the complaint, I just listed injuries I suffered from this assault. So I filed a motion for reconsideration, amended my complaint and told them that my injuries required medical attention, that I was treated and diagnosed with these ailments and am currently almost two years later being treated for these injuries directly resulting from the assault by officer Gaddy on 6-13-07. Thereby proving I met all requirements to file an excessive force claim since he violated my 8th and [redacted] amendments.

The court responded "Without proof that the alleged violence... actually caused the plaintiff's blood pressure condition to worsen plaintiff has no basis for claim." As for the psychological injuries they claim my medical records show I had preexisting mental condition but my record does not have a preexisting history of panic attack or the specific depression and anxiety that was a direct result of this. Example: Just because your bone was broken ten yrs ago does not mean if it gets broken again you had a preexisting injury.

The court basically expected me to prove my case without allowing me to even get the discovery request of my medical jacket. Plus even though that was their cause of dismissal for me not alleging certain things once I amended that they said it is not "new evidence" and I didn't allege that it was not "previously available" so my motions were dismissed because first I did not say something

hen because I did say the very same thing!

They cite Riley, 115 F.3d at 1167 saying not every malevolent touch ush or shove violates a constitutional right as their defense, but I did not allege a malevolent touch, push or shove so that case as no relevance with mine. I was attacked by a man 160 lbs eavier than me body slammed, punched, kicked, kneed and choked! nd being that it is supposed to be seen in most favorable ight I should've gotten the opportunity to prove it.

The Supreme court ruled that "when prison officials maliciously nd sadistically use force to cause harm contemporary standards decency are always violated." Hudson v. McMillian so there, no question whether my rights were violated. I just want the opportunity to prove it. It is not the judges duty to assess redibility or weigh evidence. that is for the jury.

Furthermore even without serious injuries (which I do have) it should ot end an 8th amendment suit if the actions were repugnant, done or the sole purpose of causing harm seen in the most favorable ght, I was sufficently injured and my rights were violated.

Allow me the chance to prove this with my medical records hru discovery see Haines v Kerner 404 U.S. 519, 92 S. Ct 594, 30 Ed 2d 652 (1972) reh'g denied, 405 US 948, 92 S. Ct. 963, 30 L.Ed d 819 (1972) "prisoner should be allowed opportunity to offer proof if does not appear beyond a reasonable doubt that prisoner has no proof o support his claim."

my jacket will show after the incident my blood pressure substantially increased to the point where after ten yrs of one

medication I had to and still have to take more powerful meds, I'm still being treated for migraines and I was treated for psych issues directly relating to this incident

Due to this violation of my rights. plaintiff is asking courts to grant me the opportunity to conduct discovery and thereby prove my claims in a court of law. Plaintiff only wants justice to be distributed equally. my case should not have been dismissed without this opportunity Also any further relief the court deems necessary

Sincerely,

Plaintiff Jamey Wilkins pursuant to 28 U.S.C. § 1746 declares that the foregoing is correct under the penalty of perjury

Jamey Wilkins
1300 Western Blvd
Raleigh, N.C
27606

Siglar v. Hightower 112 F.3d 191 (5th Cir 1997) Court noted that prisoner does not need to show significant injury.

Boddie v Schneider 105 F.3d 857, 861 (2d Cir 1997) official violates constitution when he uses force without any legitimate penological purpose

Burgess v. Moore 39 F.3d 216-218 (8th Cir 1994) A choking that produces actual unconsciousness and great pain is not trifling for 8th amendment purposes.

Griffin v. Crippen 193 F.3d 89, 91 (2d Cir 1999) The fact that he suffered only minor injuries does not warrant dismissal.

Hudson v. McMillian 503 US 1 6-10 (1992) Supreme Court made it clear that while extent is relevant, the lack of does not end the inquiry. Also that use of force violates 8th when not applied in good faith effort to maintain or restore discipline

Anderson v Liberty Lobby Inc 477 US 242, 247 (1986) In assessing whether there are any factual issues the court is to view evidence in the light most favorable to non moving party and draw all permissible inferences in that party's favor. Assessments of credibility conflicting versions of events and the weight to be assigned to evidence are for the jury not the court.

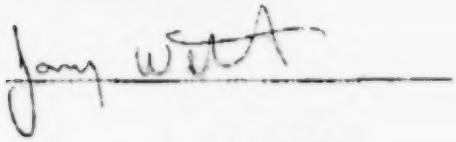
## REASONS FOR GRANTING THE PETITION

A united States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter and has sanctioned a departure by lower court.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 6-5-09

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Jamey Wilkins — PETITIONER
(Your Name)

VS.

officer Gaddy — RESPONDENT(S)

**PROOF OF SERVICE**

I, Jamey Wilkins, do swear or declare that on this date, 6-5-, 2009, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

I have no address to anyone! Only the prison Party was never notified of original claim by courts!

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 5th, 2009

(Signature)

Appeal : C

WDNC 11/04

**FORM TO BE USED BY PRISONERS IN FILING A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983**
**in the United States District Court for the Western District of North Carolina**

FILED
CHARLOTTE, NC
MAR 27 2008
U.S. DISTRICT COURT
WESTERN DISTRICT OF NC

Jamey Lamont Wilkins

(Enter above full name of plaintiff—only one plaintiff permitted per complaint)

v.

Correctional Officer Godby in his individual and official capacity

Jury Trial Demanded

(Enter above full name of defendant or defendants)

I. Previous law suits

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment? Yes ( ) No (✓)

B. If your answer to A is yes, describe each lawsuit in the space below. (If there is more than one lawsuit describe the additional lawsuits on another piece of paper, using the same outline.)

1. Parties to previous lawsuit:
   Plaintiffs: _____
   Defendants: _____
2. Court (if federal court, name the district; if state court, name the county): _____
3. Docket number: _____
4. Name of judge assigned to case: _____
5. Disposition (for example, was the case dismissed? appealed? is it still pending?) _____
6. Approximate date of filing lawsuit: _____

II. Previous *in forma pauperis* lawsuits

A. While incarcerated or detained in any facility, have you filed a lawsuit in any federal court in which you were allowed to proceed *in forma pauperis* (without prepayment of fees)?
   ( ) Yes (✓) No
   1. Name the court and docket number for each: _____

B. Were any of these cases dismissed under 28 U.S.C. § 1915(d) on the grounds that they were frivolous, malicious, or failed to state a claim upon which relief may be granted? Yes ( ) No ( )

1. If yes, how many? _____
2. Name the court and docket number for each: _____

III. Exhaustion of Inmate Administrative Remedies

A. Did you present the facts of each claim relating to your complaint to the Inmate Grievance Commission or any other available administrative remedy procedure? Yes (✓) No ( )

B. If your answer is Yes:

1. When did you file your grievance? 6-20-07
2. What was your grievance? That I was assaulted by officer Gaddy
3. Did you appeal any adverse decision to the highest level possible in the administrative procedure? Yes (✓) No ( )
   If yes, when was the decision and what was the result? The decision was 8-29-07 The result was it was dismissed for lack of supporting evidence

C. If your answer to A is no, identify the claim(s) and explain why not: _____

(*Please Attach Copies of All Filed Grievances)

IV. Parties

A. Plaintiff(s)

Name of plaintiff: Jamey Wilkins

Current address (place of confinement): P.O. Box 2500 Butner N.C. 27509

(You may lose important legal rights unless you immediately notify the court of any address change.)

B. Defendant(s) (NOTICE: A person must be identified in this subsection B in order to be considered and served as a defendant.)

Name of defendant 1: officer Gaddy
Position: Correctional Officer sued in individual and official capacity
Place of employment: Lakesboro Correctional
Current address: Upon belief and info he is still employed at Lakesboro Correctional 160 DE Corrections Center RD Polkton N.C 28135

Additional defendant(s) (provide name, position, place of employment, and current address for each)

Defendant 2: _____

Defendant 3: _____

Defendant 4: _____

(Continue on a separate sheet if necessary.)

V. Statement of Claim

**State here as briefly as possible the FACTS in your case. Do this by describing how each defendant named in Section III.B. above is personally involved in depriving you of your rights. Include relevant times, dates, and places. YOU MAY, BUT NEED NOT, GIVE LEGAL ARGUMENTS OR CITE ANY CASES OR STATUTES. You may only combine claims involving events that relate to all defendants. Number and set forth each separate claim in a separate paragraph. Unrelated claims involving separate events must be set out in a separate complaint. (Attach extra sheets if necessary.)**

On 6/13-07 plaintiff was on maximum control at Lawtey confined in his cell. At approx 1:30 pm defendant escorted an inmate to his cell and began verbally disrespecting the block. Plaintiff asked for grievance. At this time defendant became irate and said, "Shut the fuck up before I shut you up!" Plaintiff repeated his request for a grievance. Defendant returned to plaintiff's cell after securing the other inmate and began threatening to physically harm plaintiff if he kept talking.

Then defendant opened plaintiff's trap door for the sole purpose of misleading the control booth officer into thinking plaintiff was restrained and started waving to get his attention so he would open the cell door.

Without any provocation defendant did maliciously and sadistically use unnecessary excessive force by attacking the unrestrained plaintiff once the cell was opened. Defendant snatched plaintiff off the ground and slammed him onto the concrete floor then proceeded to punch, kick, knee and choke plaintiff until another officer had to physically remove him from plaintiff.

As a result of the excessive force used by defendant plaintiff sustained multiple physical injuries including a bruised heel, lower back pain, increased blood pressure as well as migraine headaches and dizziness.

Plaintiff also suffered severe psychological trauma and mental anguish including depression, panic attacks and nightmares of the assault.

VI. Relief

**STATE BRIEFLY EXACTLY WHAT YOU WANT THE COURT TO DO FOR YOU. YOU NEED NOT MAKE ANY LEGAL ARGUMENTS, OR CITE ANY CASES OR STATUTES.**

Plaintiff respectfully prays that this court declare that the acts and omissions described herein violated plaintiffs rights under the constitution and laws of the United States

Also to enter judgement in favor of plaintiff for nominal, compensatory, and punitive damages as allowed by law against the defendant

Order such additional relief as the court may deem necessary

Signed this 24th day of March, 20 08.

Prison No. 050444 Signature

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:08CV138-01-MU

| | | |
|---|---|---|
| JAMEY LAMONT WILKINS, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | |
| | ) | **ORDER** |
| OFFICER GADDY, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

**THIS MATTER** comes before the Court for an initial review of Plaintiff's Complaint pursuant to 42 U.S.C. § 1983, filed March 27, 2008.

In his Complaint Plaintiff alleges that on June 13, 2007, while he was in maximum control at Lanesboro Correctional Institution, Defendant Gaddy, a correctional officer, entered his cell and used "unwarranted excessive force by attacking the unrestrained plaintiff." Plaintiff alleges that as a result of this incident he sustained multiple physical injuries including "a bruised heel, low back pain, increased blood pressure, as well as migraine headaches and dizziness." Plaintiff also alleges that he suffered psychological injuries such as anxiety, depression, and panic attacks.

In order to state an excessive force claim under the Eighth Amendment,[1] a plaintiff must establish that he received more than a *de minimus* injury. See Riley v. Dorton, 115 F.3d 1159,

[1] Given the fact that the Plaintiff was a convicted felon at the time of the alleged incident, his excessive force claim is governed by the Eighth Amendment.

1166 (4th Cir. 1997)(en banc)(relying upon Bell v. Wolfish, 441 U.S. 520 (1979)); Taylor v. McDuffie, 155 F.3d 479, 483 (4th Cir. 1998)(en banc). The *de minimus* requirement reflects the reality of the custodial setting which indicates that "[t]he Eighth and Fourteenth Amendments . . . establish only qualified standards of protection for prisoners and pretrial detainees against 'cruel and unusual punishment' and against 'excessive force that amounts to punishment." Riley, 115 F.3d at 1167. For this same reason, the Fourth Circuit has noted that "inherent in the Eighth and Fourteenth Amendments is the principle that 'not every malevolent touch by a prison guard gives to rise to a federal cause of action . . . Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoners constitutional rights.'" Riley, 115 F.3d at 1167 (citations omitted).

Even taking Plaintiff's version of the events as true, he simply has not alleged that he suffered anything more than a de minimus injury. See Taylor, 155 F.3d at 483-86 (plaintiff's claim failed as a matter of law despite allegations that police hit him in the back, punched his ribs, placed knee in lower part of his back, while grabbing his head and pulling it backward until his back popped and shoved a wooden object into his nose with such force that his nose hemorrhaged where his medical records showed Plaintiff was only treated for abrasions on his wrists and ankles, slight swelling in jaw area, tenderness in some ribs and some excoriation of mouth and therefore did not substantiate plaintiff's claims of injury); Riley, 115 F.3d at 1167-68 (plaintiff's claim failed as a matter of law despite allegations that he suffered pain from cuffs, pain and welt from slap, fear for life and safety as well as nightmares and depression where despite a large volume of complaints there was no mention of injury related to incident). The Court's conclusion that the injuries alleged by Plaintiff are de minimus is further supported by

the fact that even though the alleged event occurred ten months ago, nowhere does Plaintiff allege that his alleged medical injuries required any medical attention – he does not allege that he has been treated by a doctor or diagnosed with any of these alleged ailments. Consequently, Plaintiff's claim fails as a matter of law.

**THEREFORE, IT IS HEREBY ORDERED that** Plaintiff's Complaint is **DISMISSED**.

Signed: April 16, 2008

Graham C. Mullen
United States District Judge

**Other Orders/Judgments**
3:08-cv-00138-GCM Wilkins v. Gaddy
PSLC1

**U.S. District Court**

**Western District of North Carolina**

**Notice of Electronic Filing**

The following transaction was entered on 4/16/2008 at 3:34 PM EDT and filed on 4/16/2008
**Case Name:** Wilkins v. Gaddy
**Case Number:** 3:08-cv-138
**Filer:**
**WARNING: CASE CLOSED on 04/16/2008**
**Document Number:** 3

**Docket Text:**
**ORDER DISMISSING CASE. Signed by Senior Judge Graham Mullen on 4/16/2008. (klg)**

**3:08-cv-138 Notice has been electronically mailed to:**

**3:08-cv-138 Notice will not be electronically mailed to:**

Jamey Lamont Wilkins
0502449
Polk Correctional Institution
P.O. Box 2500
Butner, NC 27509

The following document(s) are associated with this transaction:

**Document description:** Main Document
**Original filename:** n/a
**Electronic document Stamp:**
[STAMP dcecfStamp_ID=1095689202 [Date=4/16/2008] [FileNumber=956736-0]
[7fb3e79bbfd31fda171a33ad38200a122642ac0d3d115c9f65af1d68ae5b96968194
f4b5d0192470f8496cea2ff520b8d5532e921579c018f9bc711d8103fa81]]

evidence presented by Plaintiff in his motion to reconsider does not on its face appear to be "new evidence not previously available." Plaintiff does not even allege that the evidence at issue was not previously available. As such, Plaintiff's Motion to Reconsider is denied on that basis. However, out of an abundance of caution, this Court will address the lack of merit of Plaintiff's Motion to Reconsider.

In his Complaint, Plaintiff alleged that on June 13, 2007, while he was in maximum control at Lanesboro Correctional Institution, Defendant Gaddy, a correctional officer, entered his cell and used "unwarranted excessive force by attacking the unrestrained plaintiff." Plaintiff further alleged that as a result of this incident he sustained multiple physical injuries including "a bruised heel, low back pain, increased blood pressure, as well as migraine headaches and dizziness." In addition, Plaintiff alleged that he suffered psychological injuries such as anxiety depression and panic attacks. In the instant Motion to Reconsider,[1] Plaintiff attached medical records from the prison that were not included in the original complaint. [2]

As stated in the Court's dismissal order, in order to establish a claim of excessive force under the Eighth Amendment, a plaintiff must show that his injuries are more than de minimus. See Riley v. Dorton, 115, F.3d 1159, 1166 (4th Cir. 1997)(en banc) (relying upon Bell v. Wolfish, 441, U.S. 520 (1979)); Taylor v. McDuffie, 155 F.3d 479 (4th Cir. 1998)(en banc). The de minimus requirement reflects the reality of the custodial setting which indicates that "[t]he

[1] Judgment was entered against Petitioner by Order (Doc. No. 3) dated April 16, 2008. A motion to alter or amend judgment filed within ten days of entry of judgment is properly considered a Rule 59(e) motion regardless of how it is styled; a motion filed later than ten days after entry of judgment is considered a Rule 60 motion. See Dove v. CODESCO, 569 F.2d 807, 809 (4th Cir. 1978). Petitioner's Motion was filed on April 22, 2008, so this Court will construe his Motion as a Rule 59 motion

[2] Plaintiff offers no explanation as to why these documents were not provided initially.

Eighth and Fourteenth Amendents . . . establish only qualified standards of protection for prisoners and pretrial detainees against 'cruel and unusual punishment' and against 'excessive force that amounts to punishment." Riley, 115 F.3d at 1167. The Fourth Circuit has noted that "inherent in the Eighth and Fourteenth Amendments is the principle that 'not every malevolent touch by a prison guard gives rise to a federal cause of action . . . not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights.'" Riley, 115 F.3d at 1167.

Even taking into consideration Plaintiff's medical records, Plaintiff has not established that the injuries he suffered were more than de minimus. Several of the injuries he lists were pre-existing conditions. According to the medical records submitted with the Motion, Plaintiff was treated for high blood pressure in March of 2007, more than two months prior to the incident which precipitated his § 1983 claim. Without proof that the alleged violence which precipitated the § 1983 claim actually caused the plaintiff's blood pressure condition to worsen, a plaintiff can have no basis for a claim. See Andrews v. Elkins, 277 F. Supp. 2d 488, 492 (W.D.N.C. 2002) (holding that Plaintiff, who was on medication to control high blood pressure at the time of the incident, had no basis for a claim absent proof that the alleged incident of excessive force actually increased blood pressure). Plaintiff has made no such showing in the present case, and his medical records do not support such a claim.

Plaintiff also alleged that Defendant's use of excessive force caused him to suffer anxiety, depression, and panic attacks. Again, Plaintiff's medical records also show that he had a preexisting mental condition and was admitted for mental health issues in March of 2007, well before the alleged incident. Again, Plaintiff makes no showing that the alleged incident was the

cause of his mental health problems. Moreover, even if the incident had caused anxiety and depression in a patient with no history of such symptoms, such injuries have been held to be de minimus. Owens v. Padula, No. 8:06-3014-GRA-BHH, 2007 U.S. Dist. LEXIS 52511 (D.S.C. 2007) (holding that anxiety and depression, even when treated with medication, are de minimus injuries).

While Plaintiff's medical records show that he received an X-ray on June 20, 2007, about one week after the alleged incident, to examine his "bruised heel," this Court notes that bruising is generally considered a de minimus injury. Taylor, 155 F.3d at 484 (bruising is a de minimus injury); Stanley v. Hejirika, 134 F.3d 629, 637-38 (4th Cir. 1998) (holding that a plaintiff with bruises all over his body and a loosened tooth did not have more than a de minimus injury).

Plaintiff also complained of low back pain and migraine headaches. Though the medical records show that on the same date Plaintiff was sent for further tests to evaluate his headaches, general back pain and headaches similar to Plaintiff's are de minimus injuries. See Alexander v. Rice, No. 1:04-CV-180-01-MU, 2006 U.S. Dist. LEXIS 49572 (W.D.N.C. July 18, 2006) (dismissing the Complaint of a plaintiff who complained of lower back pain and took migraine medication because there was no objective manifestation of these de minimus injuries); Marshall v. Odom, 156 F. Supp. 2d 525, 531 (D Md. 2001) (holding that headache, facial abrasions, numbness, and swelling were de minimus injuries). Moreover, Plaintiff has not alleged any facts to cause these alleged injuries to rise above the level of a de minimus injury.

Because the documents submitted by Plaintiff with his Motion for Reconsideration fail to show that his injuries are more than de minimus, this Court denied the instant Motion for Reconsideration on that basis as well.

Plaintiff has also filed a Motion for Leave to Amend Complaint. Under Rule 15 of the Federal Rules of Civil Procedure, leave to amend will be freely granted were justice so requires. Fed. R. Civ. P. 15(a). A district court may not deny a motion to amend "simply because it has entered judgment against the plaintiff-be it a judgment of dismissal, a summary judgment, or a judgment after a trial on the merits." Laber v. Harvey, 438 F.3d 404, 427 (4th Cir. 2006) (en banc). A post-judgment motion to amend is "evaluated under the same legal standard as a similar motion filed before judgment was entered-for prejudice, bad faith, or futility." Id.. However, a district court may not grant a post-judgment motion to amend "unless the judgment is vacated pursuant to Rule 59(e) or Fed. R. Civ. P. 60(b)." Id. at 427-28. As noted above, Plaintiff has not established an adequate basis for relief under Rule 59(e) or Rule 60. Accordingly, the Motion for Leave to Amend is denied.

**IT IS, THEREFORE, ORDERED** that Plaintiff's Motion for Reconsideration (Doc. No. 5) and Motion for Leave to File an Amended Complaint (Doc. No. 8) are **DENIED.**

Signed: August 25, 2008

Graham C. Mullen
United States District Judge

APPEAL, CLOSED, PSLC1

**U.S. District Court**
**Western District of North Carolina (Charlotte)**
**CIVIL DOCKET FOR CASE #: 3:08-cv-00138-GCM**

Wilkins v. Gaddy
Assigned to: Senior Judge Graham Mullen
Cause: Prisoner Civil Rights

Date Filed: 03/27/2008
Date Terminated: 04/16/2008
Jury Demand: Plaintiff
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

**Plaintiff**

**Jamey Lamont Wilkins**

represented by **Jamey Lamont Wilkins**
0502449
Polk Correctional Institution
P.O. Box 2500
Butner, NC 27509
PRO SE

V.

**Defendant**

**Officer Gaddy**

| Date Filed | # | Docket Text |
|---|---|---|
| 03/27/2008 | 1 | COMPLAINT against all defendants, filed by Jamey Lamont Wilkins. (Attachments: # 1 IFP Motion)(klg) (Entered: 03/27/2008) |
| 04/03/2008 | 2 | ORDER Waiving Initial Filing Fee and Directing Monthly Payments to be made from the Prison Account of Jamey Lamont Wilkins. Directing the correctional facility to transmit payments.Signed by the Clerk of Court on 4/3/08. (lhg) (Entered: 04/03/2008) |
| 04/16/2008 | 3 | ORDER DISMISSING CASE. Signed by Senior Judge Graham Mullen on 4/16/2008. (klg) (Entered: 04/16/2008) |
| 04/17/2008 | 4 | CLERK'S JUDGMENT in favor of Defendant against Plaintiff. Signed by Senior Judge Graham Mullen on 4/16/2008. (klg) (Entered: 04/17/2008) |
| 04/22/2008 | 5 | MOTION for Reconsideration re 3 Order Dismissing Case by Jamey Lamont Wilkins.Responses due by 5/9/2008. (dtr) (Entered: 04/22/2008) |
| 04/22/2008 | 6 | MOTION to Appoint Counsel by Jamey Lamont Wilkins.Responses due by 5/9/2008. (dtr) (Entered: 04/22/2008) |

| | | |
|---|---|---|
| 05/19/2008 | 8 | MOTION for Leave to File Amended Complaint by Jamey Lamont Wilkins.Responses due by 6/5/2008. (klg) (Entered: 05/20/2008) |
| 05/20/2008 | 7 | ORDER denying 6 Motion to Appoint Counsel. Signed by Senior Judge Graham Mullen on 5/20/08. (dtr) (Entered: 05/20/2008) |
| 07/23/2008 | 9 | Letter from Jamey Lamont Wilkins (klg) (Entered: 07/23/2008) |
| 08/25/2008 | 10 | ORDER denying 5 Motion for Reconsideration ; denying 8 Motion for Leave to File. Signed by Senior Judge Graham Mullen on 8/25/08. (dtr) (Entered: 08/25/2008) |
| 09/03/2008 | 11 | NOTICE OF APPEAL as to 10 Order on Motion for Reconsideration, Order on Motion for Leave to File by Jamey Lamont Wilkins. (No filing fee or IFP received). (Attachments: # 1 letter)(dtr) (Entered: 09/03/2008) |
| 09/03/2008 | 12 | Transmission of Notice of Appeal to US Court of Appeals re 11 Notice of Appeal (nll) (Entered: 09/04/2008) |

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

No. 08-7881

---

JAMEY LAMONT WILKINS,

Plaintiff - Appellant,

v.

OFFICER GADDY,

Defendant - Appellee.

---

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Graham C. Mullen, Senior District Judge. (3:08-cv-00138-GCM)

---

Submitted: January 15, 2009 Decided: January 23, 2009

---

Before MOTZ and SHEDD, Circuit Judges, and HAMILTON, Senior Circuit Judge.

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Affirmed by unpublished per curiam opinion.

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Jamey Lamont Wilkins, Appellant Pro Se.

---

Unpublished opinions are not binding precedent in this circuit.

FILED: January 23, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

No. 08-7881
(3:08-cv-00138-GCM)

---

JAMEY LAMONT WILKINS,

Plaintiff - Appellant

v.

OFFICER GADDY,

Defendant - Appellee

---

J U D G M E N T

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In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: January 23, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-7881, Jamey Wilkins v. Officer Gaddy
3:08-cv-00138-GCM

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NOTICE OF JUDGMENT

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Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

**PETITION FOR WRIT OF CERTIORARI:** To be timely, a petition for certiorari must be filed in the United States Supreme Court within 90 days of this Court's entry of judgment. The time does not run from issuance of the mandate. If a petition for panel or en banc rehearing is timely filed, the time runs from denial of that petition. Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons. (www.supremecourtus.gov)

**NOTICE REGARDING CERTIORARI IN CRIMINAL CASES:** In criminal cases, counsel is required to inform the defendant, in writing, of the right to file a petition for writ of certiorari from an adverse decision. If the defendant requests, in writing, that a petition for certiorari be filed and there are grounds for seeking review, counsel shall prepare and file the petition. If counsel believes the requested petition would be frivolous, counsel may file a motion to withdraw with this Court. The motion must reflect that a copy was served on the client and the client advised of the right to file a response to the motion within seven days. (Loc. R. 46(d) & CJA Plan).

**VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED COUNSEL:** Vouchers are sent to counsel appointed or assigned by the Court in a separate transmission at the time judgment is entered. CJA 30 vouchers are sent to counsel in capital cases. CJA 20 vouchers are sent to counsel in criminal, post-judgment, habeas, and § 2255 cases. Assigned counsel vouchers are sent to counsel in civil, civil rights, and agency cases. Vouchers should be completed and returned within 60 days of the later of entry of judgment, denial of a petition for rehearing, or the grant or denial of a petition for writ of certiorari. If counsel

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 08-7881

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JAMEY LAMONT WILKINS,

Plaintiff - Appellant,

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Submitted: January 15, 2009 Decided: January 23, 2009

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Before MOTZ and SHEDD, Circuit Judges, and HAMILTON, Senior Circuit Judge.

---

Affirmed by unpublished per curiam opinion.

---

Jamey Lamont Wilkins, Appellant Pro Se.

---

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Jamey Lamont Wilkins appeals the district court's orders denying relief on his 42 U.S.C. § 1983 (2000) complaint and his Fed. R. Civ. P. 59(e) motion. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. Wilkins v. Officer Gaddy, No. 3:08-cv-00138-GCM (W.D.N.C. Apr. 17, 2008; Aug. 25, 2008). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION**
**3:08-CV-138-01-MU**

| | | |
|---|---|---|
| **JAMEY LAMONT WILKINS,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **ORDER** |
| | ) | |
| **OFFICER GADDY,** | ) | |
| | ) | |
| **Defendant.** | ) | |
| | ) | |

**THIS MATTER** is before the Court upon Plaintiff's Motion for Reconsideration (Doc. No. 5), filed on April 22, 2008, and Plaintiff's "Motion for Leave to File an Amended Complaint" (Doc. No. 8), filed on May 19, 2008.

On March 27, 2008, Plaintiff filed a Complaint pursuant to 42 U.S.C. § 1983. (Doc. No. 1.) On April 16, 2008, holding that the injuries claimed by Plaintiff were de minimus and that Plaintiff had failed to provide evidence supporting his claims, this Court dismissed Plaintiff's Complaint. (Doc. No. 3.) Plaintiff then filed the instant motions.

The Fourth Circuit has held that reconsideration is "an extraordinary remedy" that should be only "sparingly" used. Pacific Insurance Company v. American National Fire Insurance Co. 148 F. 3d 396, 403 (4th Cir. 1998). Reconsideration can only be granted on three grounds: (1) to accommodate an intervening change in controlling law; (2) to consider new evidence not previously available; or (3) to correct a clear error of law. See Hutchinson v Staton, 994 F. 2d 1076 (4th Cir. 1993), Xoom, Inc v. Imageline, Inc., 93 F. Supp. 2d 688 (E.D. Va. 1999). The

evidence presented by Plaintiff in his motion to reconsider does not on its face appear to be "new evidence not previously available." Plaintiff does not even allege that the evidence at issue was not previously available. As such, Plaintiff's Motion to Reconsider is denied on that basis. However, out of an abundance of caution, this Court will address the lack of merit of Plaintiff's Motion to Reconsider

In his Complaint, Plaintiff alleged that on June 13, 2007, while he was in maximum control at Lanesboro Correctional Institution, Defendant Gaddy, a correctional officer, entered his cell and used "unwarranted excessive force by attacking the unrestrained plaintiff." Plaintiff further alleged that as a result of this incident he sustained multiple physical injuries including "a bruised heel, low back pain, increased blood pressure, as well as migraine headaches and dizziness." In addition, Plaintiff alleged that he suffered psychological injuries such as anxiety depression and panic attacks. In the instant Motion to Reconsider,[1] Plaintiff attached medical records from the prison that were not included in the original complaint. [2]

As stated in the Court's dismissal order, in order to establish a claim of excessive force under the Eighth Amendment, a plaintiff must show that his injuries are more than de minimus. See Riley v. Dorton, 115, F.3d 1159, 1166 (4th Cir. 1997)(en banc) (relying upon Bell v. Wolfish, 441, U.S. 520 (1979)); Taylor v. McDuffie, 155 F.3d 479 (4th Cir. 1998)(en banc). The de minimus requirement reflects the reality of the custodial setting which indicates that "[t]he

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[1] Judgment was entered against Petitioner by Order (Doc. No. 3) dated April 16, 2008. A motion to alter or amend judgment filed within ten days of entry of judgment is properly considered a Rule 59(e) motion regardless of how it is styled; a motion filed later than ten days after entry of judgment is considered a Rule 60 motion. See Dove v. CODESCO, 569 F.2d 807, 809 (4th Cir. 1978). Petitioner's Motion was filed on April 22, 2008, so this Court will construe his Motion as a Rule 59 motion

[2] Plaintiff offers no explanation as to why these documents were not provided initially.

Eighth and Fourteenth Amendents . . . establish only qualified standards of protection for prisoners and pretrial detainees against 'cruel and unusual punishment' and against 'excessive force that amounts to punishment." Riley, 115 F.3d at 1167. The Fourth Circuit has noted that "inherent in the Eighth and Fourteenth Amendments is the principle that 'not every malevolent touch by a prison guard gives rise to a federal cause of action . . . not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights.'" Riley, 115 F.3d at 1167.

Even taking into consideration Plaintiff's medical records, Plaintiff has not established that the injuries he suffered were more than de minimus. Several of the injuries he lists were pre-existing conditions. According to the medical records submitted with the Motion, Plaintiff was treated for high blood pressure in March of 2007, more than two months prior to the incident which precipitated his § 1983 claim. Without proof that the alleged violence which precipitated the § 1983 claim actually caused the plaintiff's blood pressure condition to worsen, a plaintiff can have no basis for a claim. See Andrews v. Elkins, 277 F. Supp. 2d 488, 492 (W.D.N.C. 2002) (holding that Plaintiff, who was on medication to control high blood pressure at the time of the incident, had no basis for a claim absent proof that the alleged incident of excessive force actually increased blood pressure). Plaintiff has made no such showing in the present case, and his medical records do not support such a claim.

Plaintiff also alleged that Defendant's use of excessive force caused him to suffer anxiety, depression, and panic attacks. Again, Plaintiff's medical records also show that he had a preexisting mental condition and was admitted for mental health issues in March of 2007, well before the alleged incident. Again, Plaintiff makes no showing that the alleged incident was the

cause of his mental health problems. Moreover, even if the incident had caused anxiety and depression in a patient with no history of such symptoms, such injuries have been held to be de minimus. Owens v. Padula, No. 8:06-3014-GRA-BHH, 2007 U.S. Dist. LEXIS 52511 (D.S.C. 2007) (holding that anxiety and depression, even when treated with medication, are de minimus injuries).

While Plaintiff's medical records show that he received an X-ray on June 20, 2007, about one week after the alleged incident, to examine his "bruised heel," this Court notes that bruising is generally considered a de minimus injury. Taylor, 155 F.3d at 484 (bruising is a de minimus injury); Stanley v. Hejirika, 134 F.3d 629, 637-38 (4th Cir 1998) (holding that a plaintiff with bruises all over his body and a loosened tooth did not have more than a de minimus injury).

Plaintiff also complained of low back pain and migraine headaches. Though the medical records show that on the same date Plaintiff was sent for further tests to evaluate his headaches, general back pain and headaches similar to Plaintiff's are de minimus injuries. See Alexander v. Rice, No. 1:04-CV-180-01-MU, 2006 U.S. Dist. LEXIS 49572 (W.D N.C. July 18, 2006) (dismissing the Complaint of a plaintiff who complained of lower back pain and took migraine medication because there was no objective manifestation of these de minimus injuries); Marshall v. Odom, 156 F. Supp. 2d 525, 531 (D. Md. 2001) (holding that headache, facial abrasions, numbness, and swelling were de minimus injuries). Moreover, Plaintiff has not alleged any facts to cause these alleged injuries to rise above the level of a de minimus injury.

Because the documents submitted by Plaintiff with his Motion for Reconsideration fail to show that his injuries are more than de minimus, this Court denied the instant Motion for Reconsideration on that basis as well.

Plaintiff has also filed a Motion for Leave to Amend Complaint. Under Rule 15 of the Federal Rules of Civil Procedure, leave to amend will be freely granted were justice so requires. Fed. R. Civ. P. 15(a). A district court may not deny a motion to amend "simply because it has entered judgment against the plaintiff-be it a judgment of dismissal, a summary judgment, or a judgment after a trial on the merits." Laber v. Harvey, 438 F.3d 404, 427 (4th Cir. 2006) (en banc). A post-judgment motion to amend is "evaluated under the same legal standard as a similar motion filed before judgment was entered-for prejudice, bad faith, or futility." Id.. However, a district court may not grant a post-judgment motion to amend "unless the judgment is vacated pursuant to Rule 59(e) or Fed. R. Civ. P. 60(b)." Id. at 427-28. As noted above, Plaintiff has not established an adequate basis for relief under Rule 59(e) or Rule 60. Accordingly, the Motion for Leave to Amend is denied.

**IT IS, THEREFORE, ORDERED** that Plaintiff's Motion for Reconsideration (Doc. No. 5) and Motion for Leave to File an Amended Complaint (Doc. No. 8) are **DENIED.**

Signed: August 25, 2008

Graham C. Mullen
United States District Judge

FILED: May 8, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 08-7881
(3:08-cv-00138-GCM)

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JAMEY LAMONT WILKINS,

Plaintiff - Appellant

v.

OFFICER GADDY,

Defendant - Appellee

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O R D E R

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The Court denies the petition for rehearing and rehearing en banc. No poll was requested on the petition.

Entered at the direction of the panel: Judge Motz, Judge Shedd and Senior Judge Hamilton.

For the Court

/s/ Patricia S. Connor, Clerk

# OPPOSITION BRIEF

RESPONSE REQUESTED

SUPREME COURT, U.S.
FILED
OCT 16 2009
OFFICE OF THE CLERK

**ORIGINAL**

Docket Number 08-10914

IN THE
SUPREME COURT OF THE UNITED STATES

JAMEY LAMONT WILKINS, PETITIONER

v.

OFFICER GADDY, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

# RESPONDENT'S BRIEF IN OPPOSITION

RECEIVED
OCT 20 2009
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SUPREME COURT, U.S.

ROY COOPER
ATTORNEY GENERAL

Aubrey Elizabeth Faison Parsons
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Assistant Attorney General
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## QUESTIONS PRESENTED

1. Should the plaintiff be expected to prove his claims before discovery?

2. Are non visible wounds (exacerbated blood pressure, migraine, lower back pains, plus psychological trauma) considered de minimis since the only visible wound is a bruise?

3. Should a case be dismissed "sua sponte" if the possibility of proving the plaintiff's claims exists?

## LIST OF PARTIES

Petitioner: Jamey Lamont Wilkins

Respondent: Correctional Officer Gaddy

TABLE OF CONTENTS

QUESTIONS PRESENTED ..... ii

LIST OF PARTIES ..... iii

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED ..... 1

STATEMENT OF THE CASE ..... 2

REASONS FOR DENYING THE PETITION ..... 4

I. AS TO DISMISSAL UNDER RULE 12(b)(6), THE PETITION FAILS TO SHOW A COMPELLING REASON FOR GRANTING CERTIORARI ..... 5

II. AS TO DENIAL OF THE RECONSIDERATION MOTION, THE PETITION FAILS TO SHOW A COMPELLING REASON FOR GRANTING CERTIORARI ..... 14

CONCLUSION ..... 19

CERTIFICATE OF SERVICE ..... 20

APPENDIX

A. Plaintiff's (Petitioner's) Motion for Reconsideration

B. Plaintiff's (Petitioner's) Motion for Leave to File an Amended Complaint

TABLE OF AUTHORITIES

FEDERAL CASES

*Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) ..... 8, 9

*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) ..... 7

*Bell v. Wolfish*, 441 U.S. 520 (1979) ..... 5

*Boddie v. Schnieder*, 105 F.3d 857 (2d Cir. 1997) ..... 10

*Burgess v. Moore*, 39 F.3d 216 (8th Cir. 1994) ..... 10

*Davidson v. Flynn*, 32 F.3d 27 (2d Cir. 1994) ..... 10

*Griffin v. Crippen*, 193 F.3d 89 (2d Cir. 1999) ..... 11

*Haines v. Kerner*, 404 U.S. 519 (1972) ..... 11

*Hudson v. McMillian*, 503 U.S. 1 (1992) ..... 6, 11, 13

*Ingraham v. Wright*, 430 U.S. 651 (1977) ..... 5

*Norman v. Taylor*, 25 F.3d 1259 (4th Cir. 1994) ..... 6

*Obriecht v. Raemisch*, 517 F.3d 489 (7thCir. 2008) ..... 15, 16

*Pacific Ins. Co. v. American Nat. Fire Ins. Co.*, 148 F.3d 396 (4th Cir. 1998) ..... 14

*Riley v. Dorton*, 115 F.3d 1159 (4th Cir. 1997) ..... 5, 6,

*Siglar v. Hightower*, 112 F.3d 191 (5th Cir. 1997) ..... 10, 11

*Stanley v. Hejirika*, 134 F.3d 629 (4th Cir. 1998) ..... 17, 18

*Taylor v. McDuffie*, 155 F.3d 479 (4th Cir. 1998) ..... 5, 6, 7

*Walker v. Prince George's County*, 575 F.3d 426 (4th Cir. 2009) ..... 9

*Whitley v. Albers*, 475 U.S. 312 (1986) ..... 11, 12

## CIRCUIT COURT RULES

Fourth Circuit Rule 36(b) ..... 7, 14, 18

## OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals (Pet. App. D) is not reported. Orders of the United States District Court for the Western District of North Carolina (*id.*) are not reported.

## JURISDICTION

The Fourth Circuit Court entered judgment on 23 January 2009 and on 8 May 2009 denied a motion for rehearing and en banc rehearing. (*Id.*) Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) through a certiorari petition filed 9 June 2009. On 23 September 2009 this Court directed the Office of the Clerk to request that a response be filed on or before 23 October 2009.

## CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

"Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if court determines that [the action] fails to state a claim on which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii).

"Limitation on recovery. No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e).

## STATEMENT OF THE CASE

A. Procedural History.

On 27 March 2008 Petitioner, a prisoner of the North Carolina Department of Correction proceeding pro se, filed an action under 42 U.S.C. § 1983 in United States District Court for the Western District of North Carolina. The Complaint alleges generally that Petitioner was subjected to cruel and unusual punishment in violation of the Eighth Amendment. The only named party defendant is Correctional Officer Gaddy. The district court reviewed the Complaint under Title 28, Section 1915, of the United States Code. Under Section 1915(e)(2)(B)(ii), by an order filed 16 April 2008 the district court dismissed the action for failure to state a claim. Judgment was entered on the same date.

On 22 April 2008 Petitioner filed a motion for reconsideration, and on 19 May 2008 he filed a motion for leave to file an amended complaint. By an order filed 25 August 2008, the district court denied the motions. (Pet. App. D.) On 3 September 2008 Petitioner filed a notice of appeal of the order denying reconsideration. (*Id.*)

In a 23 January 2009 unpublished opinion, the court of appeals affirmed the decisions of the district court dismissing the action and denying reconsideration. (Pet. App. D.) By an order filed 8 May 2009, the court of appeals denied Petitioner's motions for rehearing and en banc rehearing. (*Id.*)

B. Facts.

Allegations in the Complaint may be summarized as follows: On 13 June 2007 Petitioner was housed on maximum control status at Lanesboro Correctional

Institution. Around 1:30 p.m. on that day, Petitioner and Respondent exchanged words and Respondent cursed Petitioner. Respondent allegedly threatened physical harm to Petitioner if he did not stop talking. Thereafter, Respondent allegedly opened the trap door in Petitioner's cell door to mislead the control booth officer into thinking that Petitioner was in restraints in his cell and hence prison policy would allow the cell door to be opened. Respondent then signaled to the control booth officer to open Petitioner's cell door. Respondent allegedly entered the cell and attacked Petitioner, slamming him onto the cell floor and then punching, kicking, kneeing, and choking Petitioner before being pulled away by another officer. Petitioner's alleged injuries were a bruised heel, lower back pain, increased blood pressure, migraine headaches, and dizziness. Other alleged injuries included severe psychological trauma and mental anguish consisting of depression, panic attacks, and nightmares. (Pet. App. C.)

Petitioner's motion for reconsideration added allegations as follows: Allegedly as a result of the June 2007 incident, Petitioner was diagnosed with migraine headaches, for which he continued to take medication up to the time of filing of the Complaint. He allegedly submitted numerous sick call requests and took medication for lower back pain up to the time of filing. His blood pressure medication allegedly was increased owing to the injury sustained from the incident. Finally, he had to consult mental health staff and continued to take depression medication and medication to prevent panic attacks. Said injuries, allegedly documented in Petitioner's prison medical record, still affected him. Attached to the reconsideration

motion were copies of two prison medical records. A Utilization Review Summary from July 2007 noted that Petitioner's complaint of headache was not due to injury or illness resulting from incarceration. The district court failed to take notice of this. A Provider Order record noted medications ordered for him from early 2007 through June 2007. (Resp. App. A.)

Petitioner's Motion for Leave to File an Amended Complaint added the following allegations: Petitioner allegedly was diagnosed by prison medical staff with severe migraines, back pain, and increased blood pressure and, eleven months after being injured, continued to receive treatment for physical injuries. The alleged injuries amounted to serious medical needs because if left untreated they would pose a substantial risk of serious harm. Further, Petitioner's alleged psychological injuries were documented and diagnosed by a psychologist, and Petitioner continued to take medication for depression and mental instability. (Resp. App. B.)

## REASONS FOR DENYING THE PETITION

This Court should exercise its discretion by declining to issue a writ of certiorari. The Petition fails to show a compelling reason or any reason under this Court's rules for issuing the writ. All orders and decisions below are unpublished.

The Questions Presented commingle the procedural and substantive issues presented--the extent of injury a pro se prisoner's complaint must allege in order to state a claim for excessive force. The district court correctly applied existing law in dismissing the Complaint and denying Petitioner's reconsideration motion. The Fourth Circuit Court did not err in affirming the orders of the district court.

I. AS TO THE RULE 12(b)(6) DISMISSAL BY THE DISTRICT COURT, THE PETITION FAILS TO SHOW A COMPELLING REASON FOR GRANTING CERTIORARI.

The Petition fails to show a split in circuit substantive or procedural law or any other criterion used by this Court in granting certiorari. No compelling reason is shown because Petitioner (i) ignores years-old cases from the Fourth Circuit Court as to which certiorari was denied and (ii) attempts instead to rely on cases from other circuits which do not support his position.

A. As to Extent of Injury, No Compelling Reason or Reason in this Court's Rules for Granting Certiorari Is Shown.

The district court dismissed Petitioner's excessive force claim because only de minimis injury was shown. The district court carefully relied on circuit precedent based directly on this Court's decisions. The district court relied squarely on *Riley v. Dorton*, 115 F.3d 1159 (4th Cir.) (en banc), *cert. denied*, 522 U.S. 1030 (Dec. 15, 1997), and *Taylor v. McDuffie*, 155 F.3d 479 (4th Cir. 1998) (en banc), *cert. denied*, 525 U.S. 1181 (Mar. 1, 1999).

In *Riley* the circuit court affirmed the district court's summary judgment dismissal of a pretrial detainee's excessive force claim. The circuit court first reasoned that such excessive force claims are not governed by the Fourth, Fifth, or Eighth Amendment and then concluded, based on *Bell v. Wolfish*, 441 U.S. 520, 535 (1979), that the claims are governed by the Due Process Clause. The circuit court relied on this Court's conclusion in *Ingraham v. Wright*, 430 U.S. 651 (1977), that "[t]here is, of course, a *de minimis* level of imposition [of punishment] with which the

constitution is not concerned." *Id.* at 674. The court noted the similarity between *Ingraham* and this Court's holding, in *Hudson v. McMillian*, 503 U.S. 1 (1992), that the Eighth Amendment "excludes from constitutional recognition *de minimis* uses of force." *Id.* at 9-10. The court also noted that, in *Norman v. Taylor*, 25 F.3d 1259, 1263 (4th Cir. 1994) (en banc), *cert. denied*, 513 U.S. 1114 (1995), decided under Eighth Amendment principles, it had applied the de minimis rule announced in *Hudson*. *Riley*, 115 F.3d. at 1166.

The factual basis for Plaintiff Riley's excessive force claim was that a police detective inserted a pen into Riley's nose and threatened to rip it open, slapped Riley's face and scraped it with his fingernails, and handcuffed him too tightly. The circuit court noted the absence of medical evidence that any injury was inflicted on Plaintiff Riley. *Id.* at 1161. The court concluded, "The *de minimis* nature of Riley's alleged injuries cannot be squared with Riley's need to demonstrate excessive force amounting to punishment." *Id.* at 1167.

Like *Riley*, *Taylor v. McDuffie* is a case in which summary judgment dismissing a pretrial detainee's excessive force claim was affirmed by the Fourth Circuit Court. *Taylor*, 155 F.3d at 480. Plaintiff Taylor claimed a police officer threw him to the floor face first, jumped on his back, hit the back of his head, and punched him in the ribs. *Id.* at 481. Further, a deputy placed his knee in Taylor's back and grabbed his head and pulled it backward until Taylor's back popped. Thereafter the deputy shoved a small wooden object into Taylor's nose , causing haemorrhage, and then shoved it into Taylor's mouth, cracking a tooth. *Id.* at 481.

The circuit court reviewed the analysis and holdings in both *Norman v. Taylor* and *Riley v. Dorton*.[1] The circuit court concluded Plaintiff Taylor had failed to show that his injuries were more than de minimis, and failure to establish this essential element mandated entry of summary judgment against him. *Id.* at 483. The court noted that "[l]ike the plaintiff in *Riley*, Taylor's medical records do not support the injuries he purports to have received." *Id.* at 484.

The Petition fails to show a compelling reason or any reason why this Court should overrule cases decided by the circuit court and relied on by the district court. The district court did not err in its application of the cases. Nevertheless, the district court's 16 April 2008 order and the circuit court's affirmance are unpublished; and the affirmance lacks precedential value. 4TH CIR. R. 36(b). For all the foregoing reasons, this Court should exercise its discretion and decline to grant certiorari.

B. No Reason for Granting Certiorari on the Procedural Issue is Shown.

The Petition fails to address the issue of whether the district court applied the correct standard in reviewing the Complaint. This Court can easily conclude the district court did not err.

Procedural law establishing standards for evaluating whether a complaint is sufficient to withstand a motion to dismiss is found in *Bell Atlantic Corp. v.*

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[1]Even though this Court had denied certiorari in *Norman* and *Riley*, Judge Murnaghan's dissent contended those cases were wrongly decided. *Id.* at 484 n 7. Thereafter, as shown hereinabove, this Court also denied certiorari in *Taylor v. McDuffie*.

*Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). A complaint that contains only "labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*). Similarly, "naked assertions devoid of further factual enhancement" do not suffice to state a claim. *Id.* This Court explained further:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.
>
> . . . .
>
> . . . . [T]hat a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . [O]nly a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not shown--that the pleader is entitled to relief.
>
> In keeping with these principles, a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an

entitlement to relief.

*Id.* at 1949-50 (internal quotations marks and citations omitted); *accord Walker v. Prince George's County*, 575 F.3d 426, 431 (4th Cir. 2009) (O'Connor, Assoc. Supreme Ct. Justice (Retired)).

Applying these principles in the specific context of excessive force claims, the district court did not err in concluding the Complaint herein failed to state a claim. In light of Fourth Circuit de minimis injury precedents upheld by this Court, the district court was required to look for factual allegations of injury. Petitioner's allegations were as follows: multiple physical injuries including a bruised heel, lower back pain, increased blood pressure, migraine headaches, dizziness, psychological trauma and mental anguish including depression, panic attacks, and nightmares. Drawing on judicial experience and common sense, the district court correctly reasoned that these allegations did not differ in any significant way from the injuries proven in *Taylor v. McDuffie* and held de minimis by the Fourth Circuit Court.

The district court did not, as contended by Petitioner, impose a requirement in excessive force cases that before discovery a pro se prisoner must present evidence concerning medical treatment. Instead, the district court, anticipating this Court's decision in *Iqbal*, recognized that some additional factual allegations were needed to save the Complaint. The district court reasoned that an allegation by Petitioner that (i) his alleged injuries required medical treatment or (ii) he in fact received medical treatment for said injuries would have provided the factual content needed to nudge

his excessive force claim from conceivable to plausible. This reasoning in no way conflicts with the principle relied on by Plaintiff that courts liberally construe pro se inmate pleadings. It is easy to understand why this example sprang to the mind of the district court, given the references to medical evidence in both *Riley* and *Taylor*. Significantly, the district court did not conclude it was necessary for Petitioner to attach medical records or give a detailed description of medical treatment rendered. A bare allegation that medical treatment was required or in fact rendered, liberally construed, would have sufficed. Under *Iqbal* either allegation would have provided factual content supporting the reasonable--and necessary--inference by the district court that Respondent was liable for the misconduct alleged.

The Petition relies on several circuit court cases decided before this Court denied certiorari in *Riley* and *Taylor*, including *Davidson v. Flynn*, 32 F.3d 27 (2d Cir. Aug. 2, 1994); *Burgess v. Moore*, 39 F.3d 216 (8th Cir. Nov. 4, 1994), *en banc reh'g denied*, 1994 U.S. App. LEXIS 36523 (Dec. 28, 1994); *Boddie v. Schnieder*, 105 F.3d 857 (2d Cir. Feb. 4, 1997); and *Siglar v. Hightower*, 112 F.3d 191 (5th Cir. May 8, 1997). *Siglar* fails to support Petitioner's arguments but is somewhat similar in that it involves a dismissal under Section 1915(e). Reasons for dismissal in *Siglar* included both lack of an arguable basis in law and failure to state an excessive force claim.

Plaintiff Siglar alleged that a correctional officer twisted his ear, which was bruised and sore for three days. The question decided by the circuit court was whether the bruised ear amounted "to a 'physical injury' that can serve as the basis

for excessive force or mental and emotional suffering claims" under the Prison Litigation Reform Act. *Id.*, 112 F.3d at 193. The circuit court applied *Hudson v. McMillian*, noting that absence of serious injury does not preclude relief, but also that de minimis uses of physical force, if not repugnant to the conscience of humankind, are excluded from constitutional recognition. The circuit court reasoned that, absent a definition of physical injury in 42 U.S.C. § 1997e(e), the Eighth Amendment injury standard--more than de minimis but not significant--applies. Concluding that a sore and bruised ear lasting for three days is de minimis and that the plaintiff failed to state an excessive force claim or show the requisite physical injury needed to support an emotional or mental suffering claim, the circuit court held that the district court did not abuse its discretion in dismissing the claims. *Id.* at 193-94. In sum, *Siglar* does not present a conflict with the instant case. The physical injury alleged by Petitioner, a bruised heel, is similar. Petitioner's additional factual allegations of headache, dizziness, back pain, and increased blood pressure fail to create a significant difference.

Only one case relied on by Petitioner, *Griffin v. Crippen*, 193 F.3d 89 (2d Cir. Sept. 20, 1999), was decided after certiorari was denied in *Taylor*. *Griffin* is factually and procedurally different and does not support Petitioner's contention herein. Injuries alleged by the plaintiff-inmate were a bruised shin and swelling over his left knee. Significantly, the district court questioned the plaintiff-inmate at a pre-trial hearing, and the inmate testified he was hit after being handcuffed by correctional officers. On these specific facts and circumstances, the circuit court

said, "Although appellant's excessive force claim is weak and his evidence extremely thin, dismissal of the excessive force claim was inappropriate because there are genuine issues of material fact concerning what transpired after appellant was handcuffed and whether the guards maliciously used force against him." *Id.* at 91. By contrast, Petitioner's Complaint entirely rules out a factual claim that he was handcuffed and then assaulted. Rather than presenting a weak excessive force claim on thin evidence, on its face the Complaint herein lacks sufficient factual matter under *Iqbal* to state a plausible claim for relief.

Petitioner also relies on cases decided by this Court, *Haines v. Kerner*, 404 U.S. 519 (1972); *Whitley v. Albers*, 475 U.S. 312 (1986); and *Hudson v. McMillian*, 503 U.S. 1 (1992). *Haines* is not, on its face, an excessive force case. Even if it could be so read, this Court did not consider whether the injuries alleged were cognizable under any provision of the constitution. *Whitley*, however, is a case in which this Court expressly considered the use of force by correctional officers in relation to the protections of the Cruel and Unusual Punishments Clause. *Whitley* is both factually and procedurally different from the instant case in that the plaintiff-inmate was shot during a prison disturbance, his claim was tried in the district court, and the court directed a verdict for Petitioner Whitley. Upon reversal and remand of the Eighth Amendment claim by the Ninth Circuit Court, this Court granted certiorari and reversed the circuit court's decision. *Whitley*, 475 U.S. at 319. This Court's decision that the shooting did not violate the plaintiff-inmate's Eighth Amendment right to be free from cruel and unusual punishment, *id.* at 326, does not furnish support for

Petitioner's contentions in this case.

*Hudson* also is procedurally different from the instant case in that testimony of witnesses was reviewed by a magistrate judge, who made findings and awarded damages to the plaintiff-inmate. On appeal, the Fifth Circuit Court reversed, holding inter alia that an inmate alleging excessive force must prove "significant" injury. This Court reversed, holding that, whenever prison officials are accused of using excessive force, "the core judicial inquiry" under the Eighth Amendment is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson*, 503 U.S. at 6-7. Notwithstanding, the Court also said, "The Eighth Amendment's prohibition of cruel and unusual punishment necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind." *Id.* at 9-10 (internal quotation marks and citations omitted).

As shown more fully hereinabove, the circuit court relied directly on *Hudson* in deciding both *Norman v. Taylor* and *Riley v. Dorton*. In deciding *Taylor v. McDuffie*, the circuit court relied on its prior cases resting directly on *Hudson*. Moreover, in 1998 when *Taylor* was decided, this Court had already denied certiorari in *Riley*. To agree with Petitioner's contentions, then, this Court must be willing to overrule three Fourth Circuit Court decisions at least ten years old which rely directly on *Hudson*. Petitioner has not shown any compelling reason for such action by this Court. The Petition fails to show conflict among the circuits on the

issue of what constitutes de minimis injury under the Eighth Amendment or the issue of standards for Rule 12(b)(6) dismissals. In light of *Norman*, *Riley*, *Taylor*, and *Iqbal*, it cannot be said that the district court erred in dismissing the Complaint for failure to state a claim. Similarly, it cannot be said that, in summarily affirming dismissal of Petitioner's action, the Fourth Circuit Court itself departed from the accepted and usual court of judicial proceedings or sanctioned such a departure by the district court or courts in the circuit. In light of those cases, it cannot be said that the Fourth Circuit Court decided an important question of federal substantive or procedural law in a way that conflicts with decisions of this Court. The district court's 16 April 2008 order and the circuit court's affirmance are unpublished, and the affirmance lacks precedential value. 4TH CIR. R. 36(b). For all the foregoing reasons, no writ should issue.

## II. AS TO THE DISTRICT COURT'S DENIAL OF PETITIONER'S RECONSIDERATION MOTION, THE PETITION FAILS TO SHOW A COMPELLING REASON TO GRANT CERTIORARI.

The district court treated Petitioner's motion as one for reconsideration under Rule 59(e), Fed. R. Civ. P. The court denied Petitioner's motion on alternative grounds. The first ground was that the motion did not present any ground recognized in law for amending the judgment dismissing Petitioner's action. The second ground was that Petitioner's new evidence failed to show more than de minimis injury.

In concluding Petitioner's reconsideration motion should be denied, the district court relied on *Pacific Ins. Co. v. American Nat. Fire Ins. Co.*, 148 F.3d 396,

402-03 (4th Cir. 1998), *cert. denied*, 525 U.S. 1104 (1999). In deciding *Pacific Insurance Company*, the Fourth Circuit Court relied on its prior decisions as well as those of the First, Fifth, Seventh, and Eighth Circuit Courts. *Id.* The circuit court summarized "three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Id.* at 403.

The district court deemed the reconsideration motion a request to consider new evidence not previously available. The district court reviewed Petitioner's evidence, concluded it was not new evidence, and noted Petitioner had failed to show why the evidence was not previously available. The district court did not err in doing so.

In a recent pro se prisoner case, *Obriecht v. Raemisch*, 517 F.3d 489 (7thCir. 2008), the Seventh Circuit revisited the reasons for which a court may deny a Rule 59(e) motion and upheld the denial of a motion based on new evidence. The district court had granted summary judgment, concluding the plaintiff-inmate "had not exhausted his administrative remedies because he had not filed any administrative complaints about the procedures used to transfer him or about the forced use of psychotropic medication." *Id.* at 491-92. The circuit court noted that the standard of review is abuse of discretion. *Id.* at 492. The circuit court concluded the district court should have treated the post-judgment motion as one under Rule 59(e) and stated as follows:

> Nevertheless, even construing his motion as a motion under Rule 59(e), Mr. Obriecht cannot prevail. Rule 59(e) allows a court to alter or amend a judgment only if the petitioner can demonstrate a manifest error of law or present newly discovered evidence. Because the district court correctly granted summary judgment to the prison officials based on Mr. Obriecht's failure to exhaust his administrative remedies, he cannot show a manifest error of law. As for the new evidence, motions under Rule 59(e) cannot be used to present evidence that could have been presented before judgment was entered. If Mr. Obriecht really did file the offender complaints when he says he did, then he could have--and should have--presented them to the district court before it rendered judgment. Mr. Obriecht offers no reason why he could not have done so. We therefore conclude that the district court did not abuse its discretion in denying Mr. Obriecht's motion.

*Id.* at 494.

As argued more fully hereinabove, the district court did not dismiss the Complaint because Petitioner failed to present evidence. Applying the reasoning of *Obriecht*, if Petitioner had received or still was receiving medical treatment, he could have--and should have--so alleged in the Complaint. Basic facts about any such medical treatment were available to Petitioner when he filed the Complaint, and his reconsideration motion failed to show any reason why he could not have alleged such facts. Under these circumstances, the district court did not err in concluding Petitioner's new evidence claim failed; and the circuit court could not find abuse of discretion.

Nevertheless, the district court also considered the merits of Petitioner's new evidence claim. Again relying on *Riley v. Dorton*, the district court considered whether the two medical records submitted by Petitioner showed more than de minimis injury. The records showed Petitioner was treated for high blood pressure

and mental health problems at least two months prior to the June 2007 incident. Petitioner's new evidence failed to show or suggest a causal connection between that incident and any aggravation of his high blood pressure or mental health problems. In addition, the district court noted that bruising, low back pain, and migraine headaches, are de minimis injuries. The district court failed to recognize that the Utilization Review record submitted by Petitioner states his migraine headaches did not result from incarceration.

The district court relied on *Taylor v. McDuffie* and *Stanley v. Hejirika*, 134 F.3d 629, 637-38 (4th Cir. 1998). *Stanley* illustrates well why the district court did not err. Alleged injuries were bruising of Plaintiff Stanley's "right arm, left jaw, left and right wrists and back, and a tooth which was loosened." *Id.* at 633. The circuit court carefully noted a critical difference between *Whitley v. Albers* and *Hudson v. McMillian*: the context of the former case was a "major prison disturbance," but the context of the latter was "a verbal argument." *Stanley*, 134 F.3d at 634. The circuit court recognized that, in the specific context of a verbal argument, this "Court found that blows deliberately directed to the inmate to punish him, causing bruises, swelling, loosened teeth, and a cracked dental plate, were sufficient to support an excessive force claim in violation of the Eighth Amendment." *Id.* (citing *Hudson v. McMillian*, 503 U.S. at 10). Moreover, the circuit court recognized that in *Hudson* the plaintiff-inmate was in handcuffs and shackles. *Id.* at 637. Nevertheless, the circuit court held the district court had erred in concluding Plaintiff Stanley's injuries included a loosened tooth. Medical records submitted in the case failed to

support such injury but revealed Plaintiff Stanley had complained about a bad tooth "*several months before* the prison disturbance." *Id.* at 637. Notwithstanding, the circuit court concluded as follows:

> Even with the finding of a loosened tooth, however, we find that bruises, swelling, and loosened tooth sustained in a fracas that occurred while prison guards were trying to quell a disturbance are constitutionally insignificant and distinct from a loosened tooth and a cracked dental plate sustained in the context of punishment deliberately inflicted by guards because of a verbal argument.

*Id.* at 638.

Comparing *Stanley* to the instant case, the district court did not err in its review of medical records attached to Petitioner's reconsideration motion. The records simply do not support Petitioner's claims, and the Utilization Review record directly undercuts a claim that Petitioner's migraine headaches resulted from his incarceration. All that was left for the district court to consider was a bruised heel. The critical factual difference between *Hudson v. McMillian* and this case is that Petitioner is foreclosed from claiming that he was in handcuffs and shackles; and, compared to injuries in *Hudson v. McMillian*, a bruised heel is de minimis injury. Accordingly, the district court did not err in concluding Petitioner's new evidence failed to show more than de minimis injury and in denying the reconsideration motion. Under these circumstances, the circuit court did not err in its affirmance. The district court's 25 August 2008 order and the circuit court's affirmance are unpublished, and the affirmance lacks precedential value. 4TH CIR. R. 36(b). For these additional reasons, this Court should decline to issue its writ.

## CONCLUSION

For all the foregoing reasons, this Court should decline to issue its writ to the Fourth Circuit Court of Appeals and the Petition should be denied.

Respectfully submitted this the 16th day of October 2009.

Aubrey Elizabeth Faison Parsons

Aubrey Elizabeth Faison Parsons
Counsel of Record
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I have this day served one copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION on the Petitioner by placing a copy of the same in the United States mail, first-class postage prepaid, addressed as follows:

Jamey Lamont Wilkins
Petitioner pro se
DOC No. 0502449
Central Prison
1300 Western Boulevard
Raleigh, North Carolina 27606

I further certify that I am a member of the Bar of this Court and that I have served all parties required to be served.

This the 16th day of October, 2009.

Aubrey Elizabeth Faison Parsons

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United States District Court

For the Western District of North Carolina

FILED
CHARLOTTE, NC
APR 22 2008
U.S. DISTRICT COURT
WESTERN DISTRICT OF NC

Jamey Lamont Wilkins
plaintiff
v.
Officer Gaddy
defendant

civil # 3:08CV-00138-01-MU

Plaintiff's Motion for Reconsideration

In its order of April 11, 2008, the court ruled sua sponte that plaintiff's claims against Officer Gaddy were due to be dismissed on the grounds that he had not alleged that he suffered anything more than a de minimus injury.

It also states that "nowhere does plaintiff allege that his alleged medical injuries required any medical attention - he does not allege that he has been treated by a doctor or diagnosed with any of these alleged ailments."

Plaintiff's claim against Officer Gaddy should be reinstated simply because plaintiff did not know he had to impart that information at that time! Since the incident plaintiff has been diagnosed with migraine headaches and is currently taking medication for it. He has numerous sick calls in and is also being currently treated with pain medication for his lower back pain. Plaintiff's blood pressure medicine has been increased due to the injury sustained from this incident. And finally plaintiff has to see mental health and is currently taking depression medication and pain medicine for current pain.

Case 3:08-cv-00138-MU Document 5 Filed 04/22/2008 Page 1 of 4

attacks All claims are documented in plaintiffs medical jacket and all injuries still affect plaintiff till this day Enclosed several documents as proof.

In Hudson v. Mcmillian the court wrote "When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated."

It was therefore error for the court to dismiss Officer Goddy on this ground. Plaintiff prays the court will reconsider and forgive him for his lack of knowledge as a pro se litigant

ressperfully, 4-17-08

Jamey Wilkins
Plaintiff

AUTHORIZATION NO. 000623735 EXPIRATION DATE : 10/02/07
LENGTH OF STAY : DAYS TOTAL APPROVED: DAYS
BEGIN DATE/TIME : 07/02/07 AT 17:30
STOP PAYMENT DATE: 07/02/07 ACTUAL DISCHARGE DATE :

COMMENTS: *** JUSTIFICATION ***
INMATE SEEN ON PHYSICAIN S/C FOR H/S AND LOWER BACK PAIN.
H/A POUNDING BUT DIFFERENT IN NATURE. SOMETIMES BEHIND THE
EYES AND SOMETIMES POSTEIR. DENIES PHOTOPHOBIA. NO N/V. SEND
TO ER TO EVALUATE OF SEVERE H/A AND ? CT OF BRAIN.

OUTSIDE PURCHASED CARE
PROVIDER : ACH03-ANSON COUNTY HOSPITA AUTHORIZATION # 000623735
BEGIN DATE : 07/02/07 TIME : 17:30
END DATE : STOP PAYMENT DATE : 07/02/07
DIAGNOSIS AT DISCHARGE: 784.0 - HEADACHE
CPT/HCPCS/VE :
SERVICE TYPE :

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UR REQUEST DATE: 07/06/07 TIME: 11:41 LOCATION: 4865 -LANESBORO CI
UR REQUEST TYPE: B-URGENT 04-PHARMACY FORMU.
UR REQUEST BY : MD/DDS/DO: DRJ03-DAWKINS, ROSAMUEL, J
NURSE : SEK02-STEVENS, ELAINE K.
DIAGNOSIS/COMPLAINT: 784.0 -HEADACHE
CPT/HCPCS/VE REQ. : J3490 -UNCLASSIFIED DRUGS
PROVIDER REQUESTED : - AT 4865 LANESBORO CI
DRUG REQUESTED : NORVASC EMER/CO-PAY EXEMPT?

A. DID CONDITION OCCUR AFTER INCARCERATION?: Y
B. DO SYMPTOMS INTERFERE WITH OFFICIAL DUTIES OR ACTIVITIES?: Y
C. DOES CONDITION CURRENTLY CAUSE PAIN THAT IS DIFFICULT TO CONTROL?: Y
D. WAS CONDITION DUE TO INJURY OR ILLNESS AS A RESULT OF INCARCERTION? N
E. IS CONDITION CURRENTLY LIFE, LIMB, OR HEALTH THREATENING?: Y
F. IF LEFT UNTREATED, WILL CONDITION DETERIORATE SIGNIFICANTLY B4 RELEASE Y
**FOR MH DRUGS, ANSWER THE FOLLOWING QUESTIONS ON THE COMMENTS SCREEN**
G. WHAT IS THE DSM-IV DIAGNOSIS?
H. WHAT MEDICATIONS IS THE INMATE CURRENTLY TAKING?
I. WHICH TARGET SYMPTOMS WILL BE TREATED BY THE NON-FORMULARY MEDICATION?
J. WHAT MEDICATIONS AND DOSAGES HAVE ALREADY BEEN PRESCRIBED FOR THE TARGETED SYMPTOMS AND WHAT WAS THE RESPONSE TO THOSE TRIED MEDICATIONS?
K. WERE THERE ANY ADVERSE EFFECTS FROM THE PREVIOUS PRESCRIBED MEDICATION?

ACTION : 07/06/07 12:00 BY FJP04-FUSSELL, JANE P. ACTION:DRUG/PENDED
REASON(S) EVL - FURTHER EVALUATION
PENDED TO: CLT04- CROSS, LINDA T.

# NORTH CAROLINA DEPARTMENT OF CORRECTION
## PROVIDER ORDERS

AUTHORIZATION IS GIVEN BY GENERIC NAMES UNLESS CHECKED HERE ☐

| DATE | TIME | ALLERGIES: NKA |
|---|---|---|
| 12/30/07 | 1032 | ① HCTZ 25mg po daily |
| | | ② Mental Health Admission |
| 27 Nov 07 | 0200 | ① HCTZ 25mg 1 qday x 6 months |
| | | ② Ibu 800mg 1 TID x 6 months |
| | | ③ Celexa 40mg 1 QD x 6 months |
| | | ④ D/c nsm, percocet, Tylenol and Ambien (done) |
| | | ⑤ Depakote ER 1 BID MH |

Frank Stamper, PA-C

Rosemarie Davis Jr., MD

| | | |
|---|---|---|
| 26 Nov 07 | 0200 | ① Xray C-Spine |
| | | ② chest recon - bronchitis |

Rosemarie Davis Jr., MD

Frank Stamper, PA-C

This form is not to be amended, revised or altered without approval of the Medical Record Committee.

File Outpatient/Inpatient Health Record Section VI

Inmate Name Williams, Jamie

Inmate Number [illegible] 2449

Unit MH

RESPONDENT'S EXHIBIT B

FILED
CHARLOTTE, NC
MAY 19 2008
U.S. DISTRICT COURT
WESTERN DISTRICT OF NC

In The United States District Court

For The Western District of North Carolina

Jamey Lamont Wilkins

plaintiff,

v

Officer Fraley

defendant.

Civil Action No 3:08CV138-GCM

MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

Plaintiff Jamey Wilkins pursuant to Rules 15(a) and 19(a) Fed. R. Civ. P, requests leave to file an amended complaint including more facts.

The plaintiff in his original complaint alleged a sustained medical injuries but did not say he saw or received medical attention.

Since filing the complaint plaintiff realizes he should have stated specifically therefore plaintiff wishes to add the facts.

Plaintiff was diagnosed by medical staff with severe migraines, back pain, increased blood pressure and is still to this day eleven months later being treated for these physical injuries These same injuries are continued

serious medical needs because if left untreated they pose a substantial risk of serious harm.

Courts have found a violation of the Eighth Amendment where prison officials were responsible for the "unnecessary and wanton infliction of pain." also A guard's use of force was not applied "in a good faith effort to maintain or restore discipline" violates the eigh Hudson v. McMillian

Also the psychological injuries are documented and diagnosis by a psychologist and till this day I am still taking medication for depression and mental instability

"This court should grant leave freely to amend a complaint Foman v. Davis 371 US 178, 182 (1962) Especially if plaintiff is alleging a civil rights violation Ricciuti v. N.Y.C. Transit Authority 941 F.2d 119, 123 (1991)

May 12th 2008

Respectfully submitted

Jamey Wilkins
P.O Box 350
Butner, N.C.
27509

State of North Carolina
Department of Justice
PO Box 629
Raleigh, North Carolina
27602

ROY COOPER
ATTORNEY GENERAL

REPLY TO
RENAY JENNETTE
Paralegal
Corrections Section
Telephone 919-716-6500
Facsimile 919-716-6761

16 October 2009

The Honorable William K. Suter, Clerk
U.S. Supreme Court
Office of the Clerk
Washington, D.C. 20543-0001

Re: *Jamey Lamont Wilkins v. Officer Gaddy*
No.08-10914

Dear Mr. Suter:

Enclosed please find for filing the original and eleven copies of Respondent's Brief in Opposition regarding the above-referenced action. Please file-stamp the additional copy and return it to our office in the enclosed postage- paid envelope.

Thank you for your assistance

Very truly yours,

Renay Jennette

Renay Jennette
NC Certified Paralegal

Enclosure

RECEIVED
OCT 20 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.